

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

ANDREW P. Y.,

Plaintiff,

Civil Action No.
3:19-CV-0475 (DEP)

v.

ANDREW M. SAUL, Commissioner of Social
Security,¹

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LEGAL AID SOCIETY OF MID-NEW
YORK, INC.
Syracuse Office
221 South Warren Street, Suite 310
Syracuse, NY 13202

ELIZABETH V. KRUPAR, ESQ.

¹ Plaintiff's complaint named Nancy A. Berryhill, in her capacity as the Acting Commissioner of Social Security, as the defendant. On June 4, 2019, Andrew Saul took office as Social Security Commissioner. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

FOR DEFENDANT

HON. GRANT C. JAQUITH
United States Attorney
P.O. Box 7198
100 S. Clinton Street
Syracuse, NY 13261-7198

DANIEL TARABELLI, ESQ.
Special Assistant U.S. Attorney

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.² Oral argument was heard in connection with those motions on May 28, 2020, during a telephone conference conducted on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and

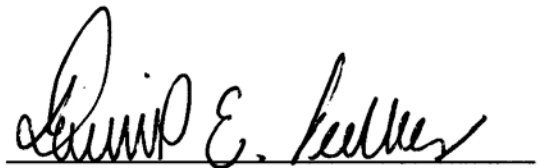
² This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.
- 3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: June 1, 2020
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
ANDREW PHILIP Y.,

Plaintiff,

vs.

3:19-CV-475

ANDREW M. SAUL, COMMISSIONER OF
SOCIAL SECURITY,

Defendant.
-----x

Transcript of a **Decision** held during a
Telephone Conference on May 28, 2020, the HONORABLE
DAVID E. PEEBLES, United States Magistrate Judge,
Presiding.

A P P E A R A N C E S

(By Telephone)

For Plaintiff: LEGAL AID SOCIETY OF MID-NEW YORK
221 South Warren St., Suite 310
Syracuse, New York 13202
BY: ELIZABETH V. KRUPER, ESQ.

For Defendant: SOCIAL SECURITY ADMINISTRATION
Office of the General Counsel
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BY: DANIEL TARABELLI, ESQ.

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100 South Clinton Street
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1 (The Court and counsel present by telephone.)

2 THE COURT: I'd like to thank counsel for excellent
3 presentations, both written and verbal. I've enjoyed working
4 with you, this was an interesting case.

5 Plaintiff has commenced this proceeding pursuant to
6 42 United States Code Sections 405(g) and 1383(c)(3) to
7 challenge a determination by the Commissioner of Social
8 Security finding that plaintiff was not disabled at the
9 relevant times and therefore ineligible for the benefits
10 which he sought.

11 The background is as follows: Plaintiff was born
12 in August of 1976, he is currently 43 years old. He was 34
13 years of age at the time of the alleged onset of disability
14 in July 2010, and 40 at the time of the hearing in this
15 matter which was conducted in February 2017. Plaintiff at
16 various times has lived in Bainbridge and more recently at
17 the time of the hearing in Norwich, New York. He lives alone
18 although he has a girlfriend. Plaintiff has no children.
19 Plaintiff is 5 foot 10 inches in height and, at least
20 according to page 282 of the administrative transcript,
21 weighs 250 pounds. Plaintiff is right-handed. He has a GED
22 and while in school attended regular classes. Plaintiff did
23 have a driver's license but it was suspended.

24 In terms of work, plaintiff last worked on July 1,
25 2010. He worked as a laborer from 1997 to 1999. From 2003

1 to 2004, he worked as a mechanical tech person/technological
2 person at a recycling -- two different recycling facilities.
3 There is indication he was laid off from those positions.
4 From 2005 to 2007 he worked as a park ranger at Fire Island
5 and was laid off possibly as result of a seasonal issue from
6 that position. From 2007 to 2008, plaintiff was a seasonal
7 delivery person for UPS. He also worked in 2010 as a gas
8 station deli person for four to five months. That job ended
9 due to excessive absenteeism.

10 The plaintiff physically has a back issue that
11 stems possibly from an incident when he fell off the back of
12 a UPS truck. The record is unclear but it appears that it
13 occurred possibly in early 2008 and resulted in a Workers'
14 Compensation claim. He suffers from degenerative disk
15 disease and degenerative joint disease in his thoracic and
16 lumbar region and from pain that radiates down into his legs
17 to his feet. Plaintiff's primary physician is Dr. Michael
18 Freeman. He also sees neurosurgeon Dr. Saeed Bajwa. In 2011
19 surgery was discussed and it looks like it was planned or
20 contemplated, as appears from 791 to 793 of the
21 administrative transcript, but apparently was never carried
22 through. Plaintiff was also referred fairly recently in 2017
23 to Dr. Javaid Malik for pain relief. Plaintiff testified,
24 however, that Dr. Malik would not prescribe opiates that he
25 requested. That's at page 57 of the administrative

1 transcript. Plaintiff was hospitalized in October of 2011
2 with diskitis and vertebral body osteomyelitis, an infection,
3 that appears at 860 to 866, but that appears to have cleared.
4 He was also hospitalized and underwent surgery in July 2014
5 when a dorsal column stimulator was surgically implanted
6 after an earlier trial run. The results reported that
7 surgery at 816 to 819 of the administrative transcript.

8 The plaintiff has undergone over time significant
9 MRI and CT scans and x-rays. In December of 2011, he
10 underwent thoracic x-rays which reflected extensive disk
11 space narrowing as well as endplate destruction at the T11-L1
12 level, likely related to the prior diskitis. Otherwise no
13 significant abnormalities were seen within the thoracic and
14 lumbar spine.

15 On January 29, 2013, CT scan testing reflected,
16 among other things, a small central disk protrusion extending
17 posteriorly by about 3 millimeters at the L4-L5 level but
18 with no central canal stenosis, no foraminal stenosis, and
19 the impression given was there is an old compression fracture
20 involving the T12 vertebral body, there has been interval
21 osseous fusion from a post-traumatic basis between T12 and
22 L1, no central canal stenosis or foraminal stenosis.

23 CT scan conducted later on April 16, 2014 reflected
24 again an auto fusion that occurred at the T11-L1 level. The
25 impression listed was no significant change in two months.

1 L -- T12-L1 auto fusion after prior diskitis/osteomyelitis
2 but no evidence of neural compression.

3 Dr. Saeed was seen and magnetic resonance imaging
4 or MRI testing was conducted on April 4, 2014 of the lumbar
5 spine reflecting broad diffuse disk bulge at the L4-L5 level
6 as well as central disk herniation and annular tear which is
7 similar in appearance to a prior study but no definitive
8 nerve root compression seen.

9 That followed an earlier MRI that was conducted on
10 April 11, 2013, which revealed continued progression of
11 diskitis, osteomyelitis at T12-L1 level, with near complete
12 loss of disk height at that level but there has been interval
13 resolution of the previously visualized endplate edema, mild
14 worsening in the wedge deformity involving T12 vertebral
15 body.

16 Magnetic resonance imaging testing was again
17 conducted in June of 2014, also reflecting the L4-L5 small
18 broad-based central disk protrusion and annular fissure, but
19 without significant central or foraminal narrowing and also
20 no significant change in appearance of T12-L1 level or
21 findings to suggest residual infectious inflammatory process.

22 On September 13, 2015, MRI testing was again
23 conducted revealing the disk bulge with a small central disk
24 protrusion and annular fissure at L4-L5 and a minimal bulge
25 at L5-S1. The impression listed on that was there is mild

1 degenerative disease within the lumbar spine without high
2 grade central or foraminal narrowing. No significant change
3 from the prior study.

4 Plaintiff also appears to suffer from diabetes,
5 hypertension, and hyperlipidemia, although those do not
6 appear from the medical records to impose any limitations on
7 his ability to perform work-related functions.

8 Mentally, plaintiff suffers from an adjustment
9 disorder with anxiety but has not undergone any treatment or
10 medication to address that condition.

11 In terms of medications, plaintiff has been
12 prescribed oxycodone, Oxycontin, Lorazepam, Ativan, he takes
13 Advil, he has a Proventil inhaler and has been prescribed
14 lisinopril.

15 In terms of activities of daily living, plaintiff
16 cooks, does laundry, shops, he can shower and dress, he
17 watches television, listens to the radio, reads, he does not
18 do any cleaning, apparently his girlfriend helps do that and
19 other chores. He testified that he goes out of his home one
20 to two times per week. Plaintiff has a history of
21 incarceration for contempt as result of violation of an order
22 of protection and harassment.

23 The evidence suggests that plaintiff has a
24 substance abuse condition or has had in the past. The --
25 there is evidence of drug-seeking behavior at 575. In July

1 of 2011 needle marks over veins were observed. In December
2 of 2014, EMS workers reported that -- to medical officials
3 that plaintiff was a known drug user, that's at 1222 of the
4 administrative transcript. Plaintiff has denied any heroin
5 use during his testimony at page 63 of the administrative
6 transcript. Plaintiff smokes one pack per day and has since
7 he was 16 years old.

8 Procedurally, plaintiff applied for Title II and
9 Title XVI benefits under the Social Security Act on August 4,
10 2014 alleging an onset date of July 1, 2010. He claimed --
11 claims inability to work based on back issues, herniated
12 disks in the back, bulging disks in spine, joint hypertrophy,
13 neurostimulator in spine, neuropathy, degenerative disk
14 disease, fusion of spine, and osteoarthritis, that's at page
15 282. At pages 296 to 299 he claims inability to work based
16 on problems in lifting, standing, walking, sitting, climbing
17 stairs, kneeling, and squatting.

18 A hearing was conducted on February 23, 2017 by
19 Administrative Law Judge Gretchen Mary Greisler to address
20 plaintiff's claims. A supplemental hearing was conducted on
21 December 6, 2017. On February 5, 2018, Administrative Law
22 Judge Greisler issued a decision finding that plaintiff was
23 not disabled at the relevant times and therefore ineligible
24 for the benefits sought. That decision became a final
25 determination of the agency on March 8, 2019 when the Social

1 Security Administration Appeals Council denied plaintiff's
2 request for review. This action was commenced on April 23,
3 2019, and is timely.

4 In her decision, Administrative Law Judge Greisler
5 applied the five-step familiar sequential test for
6 determining disability. She first found that plaintiff was
7 last insured on June 30, 2013.

8 At step one, she found that plaintiff was not
9 engaged in substantial gainful activity and has not been
10 since July 1, 2010.

11 At step two, the administrative law judge concluded
12 that plaintiff does suffer from severe impairments that
13 impose more than minimal limitations on the ability to
14 perform work-related functions, including degenerative disk
15 disease and degenerative joint disease in the thoracic spine
16 and lumbar spine.

17 At step three, she concluded that plaintiff's
18 conditions did not meet or medically equal any of the listed
19 presumptively disabling impairments set forth in the
20 Commissioner's Regulations, specifically considering Listing
21 1.04.

22 Based on a survey of the medical evidence and the
23 entire record, ALJ Greisler next concluded that plaintiff
24 retains the residual functional capacity or RFC to perform
25 sedentary work with certain exceptions as follows: The

1 claimant can sit for up to two hours at a time before needing
2 to change position for at least 10 minutes but retaining the
3 the ability to remain on task. The claimant can stand or
4 walk for up to one hour at a time before needing to change
5 position for at least 10 minutes but retaining the ability to
6 remain on task. The claimant can stand up for two hours per
7 day and walk for up to two hours per day. He can
8 occasionally reach overhead and use foot controls. The
9 claimant can occasionally climb ladders -- I'm sorry, stairs
10 and ramps, balance, stoop, kneel, crouch, and crawl but can
11 never climb ladders, ropes, or scaffolds. The claimant
12 cannot work at unprotected heights or tolerate concentrated
13 exposure to vibration, humidity, and wetness or extreme cold.

14 Applying that RFC, the administrative law judge
15 next concluded that plaintiff is incapable of performing his
16 past relevant work as a part worker/mechanic at a recycling
17 company. It was a position that is typically as generally
18 performed medium and with an SVP of 2, although the
19 vocational expert concluded that it was performed at a heavy
20 exertional limit with an SVP of 3.

21 The administrative law judge next concluded that if
22 plaintiff was capable of performing a full range of sedentary
23 work, the Medical-Vocational Guidelines and specifically Grid
24 Rule 201.27 would direct a finding of no disability.

25 She concluded based on the testimony of a

1 vocational expert and interrogatory responses that plaintiff
2 is capable of performing the functions of a charge account
3 clerk, a call-out operator, and a stuffer as representative
4 occupations and therefore was not disabled at the relevant
5 times.

6 As you know, the court's standard of review is
7 exceptionally deferential. I must determine whether correct
8 legal principles were applied and whether the resulting
9 determination is supported by substantial evidence.
10 Substantial evidence has been defined as such relevant
11 evidence as a reasonable mind might accept as adequate to
12 support a conclusion. The standard, as the Second Circuit
13 noted in *Brault v. Social Security Administration*, 683 F.3d
14 443, a 2012 decision, is a rigorous standard. Substantial
15 evidence standard is deferential, and is even more stringent
16 than the clearly erroneous standard. The Second Circuit also
17 noted in *Brault* that substantial evidence standard means that
18 once an ALJ finds a fact, that fact can be rejected only if a
19 reasonable fact finder would have to conclude otherwise.

20 The plaintiff in this case has raised three basic
21 contentions. The first concerns the weight of evidence given
22 to various medical opinions, and wrapped within that,
23 subsumed within that contention is the treating source
24 argument, the argument that the opinions of Dr. Michael
25 Freeman were not properly accorded controlling weight and

1 that the *Burgess* factors, the familiar *Burgess* factors were
2 not considered. The -- there's also challenge to the
3 opinions of Dr. Fuchs and Dr. Leong.

4 The second is what was once known as the
5 credibility analysis. Plaintiff challenges the
6 administrative law judge's consideration of plaintiff's
7 subjective complaints of pain.

8 And the third is a step five challenge arguing that
9 the -- there is an insufficient showing of the number of jobs
10 available that plaintiff is capable of performing to meet the
11 significant number test.

12 As a backdrop, I note that it is plaintiff's burden
13 through step four and including the residual functional
14 capacity step to establish not only his conditions but the
15 limitations associated with those conditions. There are
16 several medical opinions that have been issued in this case.
17 Dr. Michael Freeman, a treating source, on February 17, 2017
18 issued a very restrictive opinion stating that plaintiff is
19 unable to sit more than 15 to 30 minutes, cannot stand or
20 walk more than 15 to 30 minutes at a time without breaks.
21 Also Dr. Freeman indicated that plaintiff would be off task
22 more than 50 percent of the time and would be absent three or
23 more times per month. His opinion is at 19F.

24 Dr. Gilbert Jenouri examined the plaintiff on
25 November 19, 2014. He made certain observations at 1139. He

1 found that the straight leg test right 20 degrees was
2 positive and left 20 degrees positive, both confirmed seated.
3 He addressed the plaintiff's range of motion and concluded in
4 his medical source statement at page 1140 that plaintiff has
5 moderate restriction to walking, standing, sitting long
6 periods, bending, stair climbing, lifting, and carrying.

7 The -- Dr. S. Putcha on December 8, 2014, based on
8 review of the record that was available at that point in
9 time, concluded that plaintiff retained the residual
10 functional capacity for entry level light work, that's at
11 page 118.

12 Dr. Gauthier issued an opinion on February 12, 2015
13 at page 119 and 120 and in his opinion he noted that the
14 evidence supports two brief episodes of very disabling pain,
15 neither of which lasted anywhere close to 12 months. It then
16 shows ongoing poorly credible reports of severe pain in the
17 context of documented drug use and drug-seeking behavior,
18 indicated that there has been no sustained period of 12
19 months when the claimant hasn't been described as comfortably
20 walking without assist, RFC has never been less than for
21 carrying 20 pounds occasionally, 10 pounds frequently, sit
22 six for any sustained length of time.

23 It was noted in an emergency room report on
24 February 12, 2014 by Dr. Daniel Dickinson who saw the
25 plaintiff for chronic low back pain that plaintiff should

1 avoid bending, heavy lifting, prolonged sitting, and
2 activities which make the problem worse. He was advised,
3 however, to continue normal activity as much as possible.
4 That's at pages 699 and 700 of the administrative transcript.

5 Dr. Dorothy Leong reviewed the available medical
6 evidence at the time and issued an opinion on March 10, 2017.
7 At page 1350 she concluded the following: Based upon the
8 review of medical records, this individual should be able to
9 lift 20 pounds occasionally, 10 pounds frequently, sit,
10 stand, and walk six hours in an eight-hour workday with
11 normal work breaks. There are no limitations in regards to
12 use of the hands or feet. In regards to postural
13 limitations, ramps and stairs are occasionally, no ladders
14 for scaffolds -- I think that's probably a typo, should be or
15 scaffolds, balancing and stooping are continuously.
16 Kneeling, crouching, and crawling are occasionally, there are
17 no visual or communicative limitations. In regards to
18 environmental limitations, no unprotected heights, otherwise
19 there are no environmental limitations.

20 And lastly, Dr. Louis Fuchs on June 19, 2017 issued
21 an opinion with a function-by-function check-the-box form,
22 found that plaintiff is capable of performing, including
23 lifting and carrying up to 10 pounds continuously and up to
24 20 pounds frequently. Can sit eight hours in an eight-hour
25 workday and stand and walk two hours in an eight-hour

1 workday. He also found that there would be occasional
2 reaching overhead but otherwise use of the hands was, that
3 could be continuous. That opinion appears at page --
4 Exhibit 26F, I'm sorry.

5 So the administrative law judge first reviewed the
6 decision -- the opinions of Dr. Freeman. As a treating
7 source normally Dr. Freeman's opinions would be entitled to
8 controlling weight provided that his opinions were not
9 inconsistent with other substantial evidence. When
10 controlling weight is not accorded to a treating source's
11 opinion, the administrative law judge must apply several
12 factors that have often been referred to as the *Burgess*
13 factors, including the length of the treatment relationship
14 and frequency of examination, nature and extent of the
15 treatment relationship, the evidence supporting the treating
16 provider's opinion, the degree of consistency between the
17 opinion and the record as a whole, whether the opinion was
18 given by a specialist, and other evidence brought to the
19 attention of the administrative law judge. 20 C.F.R.
20 Sections 404.1527 and 20 C.F.R. Section 416.927. When a
21 treating physician's opinions are repudiated, the
22 administrative law judge must provide reasons for the
23 rejection and those reasons obviously must have substantial
24 evidence backing. In this case the administrative law judge
25 accorded partial weight to the opinions of Dr. Freeman.

1 Those -- the opinions were discussed at pages 23 and 24 of
2 the administrative transcript. Admittedly, the *Burgess*
3 factors are not recited rotely in the administrative law
4 judge's decision; however, the decision referred to him as
5 the treating source, reviewed to him as a DO, there was an
6 explanation for the partial rejection and, as the
7 Commissioner has argued, the Second Circuit has noted in
8 several cases, most recently *Guerra v. Saul*, 778 F. App'x 75
9 from October of 2019, the court has overlooked the failure to
10 explicitly consider and rotely list the *Burgess* factors if a
11 searching review of the record assures that the substance of
12 the treating physician rule is not traversed.

13 In this case, I find that the administrative law
14 judge did provide good reasons for the rejection of the
15 treating source's opinions. I do acknowledge that the --
16 there is some evidence in the record supporting plaintiff's
17 claims but that is not sufficient to negate the finding of
18 substantial evidence supporting the administrative law
19 judge's determination. In this case I'm not convinced that a
20 reasonable fact finder would have to accept Dr. Freeman's
21 opinions, and I think that once again, the administrative law
22 judge did provide good reasons and those reasons are
23 consistent with the record when considered as a whole.

24 The administrative law judge properly gave weight
25 to Dr. Jenouri's opinions. Dr. Jenouri was an examining

1 physician, and his opinions were accorded great weight and
2 certainly provide substantial evidence to the residual
3 functional capacity finding.

4 Great weight was also given to Dr. Putcha and
5 Dr. Gauthier and although they were not examining physicians,
6 they are agency physicians with expertise and knowledge of
7 Social Security law and their opinions also can provide
8 substantial evidence.

9 Dr. Fuchs' opinions were given great weight at
10 page 25 and considered, and as well as some weight which was
11 provided to Dr. Leong's opinions at 25, 26.

12 The administrative law judge also considered the
13 statement of Dr. Dickinson that was referred to earlier. All
14 of these can provide and in fact do provide substantial
15 evidence in this case to support the residual functional
16 capacity. The weight given to each of these opinions was
17 adequately explained by the administrative law judge. I find
18 no basis to conclude that a reasonable person would have to
19 reject those opinions.

20 The -- I do note that there is substantial
21 reliance on what occurred in October of 2011. I think that's
22 misplaced. It appears that plaintiff was hospitalized with
23 an infection, surgery was planned but never carried out. By
24 the end of the year, as reflected in two notes, one from
25 November 27, 2011 at 566, and one from December 22, 2011 at

1 795, that plaintiff appeared to be fairly normal. He did
2 have some sort of automatic fusion as result of this at the
3 T12-L1 level but it does not seem to have significantly
4 provided residual pain of a debilitating nature.

5 Dr. Leong's opinion was challenged because of
6 subsequent medical evidence that was not considered by her,
7 but I find that the subsequent evidence was generally
8 consistent with earlier records that she did review and
9 therefore this does not provide a basis to reject her
10 opinions. Also I find that her failure to appear at a
11 hearing is no basis to reject her opinions, but even if her
12 opinions are rejected, that would be a harmless error because
13 of the existence of the many other opinions that do provide
14 substantial evidence.

15 Turning to analysis by the administrative law
16 judge of plaintiff's subjective complaints, that is of course
17 governed by Social Security Ruling 16-3p. It requires the
18 administrative law judge to review the entire record. The
19 administrative law judge explained her opinion. She first
20 recited plaintiff's claims at page 21 and then proceeded to
21 analyze those claims at pages 21 through 27 of her opinion.
22 She relies to a large degree on plaintiff's evidence of drug
23 seeking and opiate abuse behavior. These are proper
24 considerations and can explain why a plaintiff might tend to
25 exaggerate his claims of pain in order to obtain and support

1 his opiate abuse. Plaintiff also relies -- I'm sorry, the
2 administrative law judge also relied on modest MRI results
3 and treatment notes showing normal gait, modest, if any,
4 limitation in range of motion, and once again, although
5 there's existence of evidence that supports plaintiff's
6 contentions concerning pain, doesn't necessarily negate
7 plaintiff's -- the administrative law judge's finding of
8 plaintiff's claims being exaggerated.

9 The court of course is not positioned to
10 reweigh the evidence, it must only determine if the evidence
11 was properly weighed and whether substantial evidence
12 supports the credibility finding and whether no reasonable
13 fact finder could rule as the administrative law judge did on
14 the issue of credibility. I -- and I cannot find that to be
15 the case. I do find substantial evidence supporting the
16 analysis of plaintiff's subjective claims.

17 Last issue raised by the plaintiff concerns
18 the step five determination where of course the burden rests
19 with the Commissioner. To satisfy that burden, the
20 Commissioner may rely on the testimony or opinions of a
21 vocational expert. The obligation of the Commissioner is to
22 prove the existence of a significant number of jobs in the
23 national economy that plaintiff is capable of performing. 20
24 C.F.R. Section 404.1566. Unfortunately, the regulations do
25 not define what is a significant number. There is case law

1 suggesting that 4,000 to 5,000 would not be significant, a
2 significant number of jobs. There is also case law that over
3 9,000 would suffice to establish the existence of a
4 significant number of jobs. *Kelly D. v. Saul*, unreported but
5 at 2019 WL 6683542 from December 6, 2019 is a decision from
6 one of my colleagues, Judge Stewart, who surveyed some of the
7 case law on the issue and noted that over 9,000 has been held
8 by other courts to be significant.

9 The issue is also addressed by one of my
10 colleagues, Magistrate Judge Carter in *Hanson v. Commissioner*
11 *of Social Security*, 2016 WL 3960486 from June of 2016, and
12 once again, Judge Carter noted that numbers varying from
13 9,000 upwards have been considered significant and numbers
14 around 4,000 to 5,000 have been -- not been considered to be
15 significant.

16 In this case, it is very clear to me that the
17 administrative law judge made a mathematical error. When you
18 add up the number of jobs available in the three categories
19 cited, as per the interrogatory responses of the vocational
20 expert, the number is 11,854. The administrative law judge
21 made a 3,000-job error and concluded that 8,854 was the
22 correct number. I agree with the Commissioner that if we
23 were to say that the correct number is 8,854 and analyze that
24 and conclude that that is not a significant number, it would
25 be meaningless to remand the matter because the

1 administrative law judge clearly would rely on the vocational
2 expert's testimony and conclude that there were 11,854 jobs,
3 and that is of course a sufficient number to establish a
4 significant number. But even if we accept 8,854, that is
5 close enough to 9,000 that I conclude that that would
6 constitute a significant number and therefore in any event
7 the step five determination is sufficient, supported by
8 substantial evidence and the Commissioner has properly
9 carried his burden at step five.

10 So in conclusion, I find that correct legal
11 principles were applied in this case, and that substantial
12 evidence supports the resulting determination. I will
13 therefore grant judgment on the pleadings to the defendant
14 and order dismissal of plaintiff's complaint.

15 Once again, thank you both for excellent
16 presentations, I hope everyone stays safe and stays sane.

17 MS. KRUPER: Thank you, your Honor. Stay safe,
18 everyone.

19 MR. TARABELLI: Thank you, your Honor.

20 (Proceedings Adjourned, 11:50 a.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
United States District Court for the Northern
District of New York, DO HEREBY CERTIFY that
pursuant to Section 753, Title 28, United States
Code, that the foregoing is a true and correct
transcript of the stenographically reported
proceedings held in the above-entitled matter and
that the transcript page format is in conformance
with the regulations of the Judicial Conference of
the United States.

Dated this 29th day of May, 2020.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter